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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

REBECCA A. BOOSTROM,

Petitioner,

--v.--

STEPHEN BACH,

Respondent.

JOINT APPENDIX

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE UNITED STATES

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42 pp

TABLE OF CONTENTS

APPENDIX A
U.S. Constitution, Amendment 14 1, and 28 U.S. Code 1254 and 1257.

APPENDIX B
Opinion of the Indiana Supreme Court, dated October 26, 1993

APPENDIX C
Denial of Petition Rehearing of the Indiana Supreme Court dated February 23, 1994.

APPENDIX D
Opinion of the Indiana Court of Appeals, dated April 6, 1992

APPENDIX E
Opinion on Rehearing of the Indiana Court, dated November 23, 1992

APPENDIX F
Courtroom Ruling of the Vanderburgh Superior Court, Small Claims Division, State of Indiana,rendered June 4, 1990.

APPENDIX G
Summary Judgement, Vanderburgh Superior Court, Small Claims Division, State of Indiana

APPENDIX H
Relevant Portions of the Transcript of June 4, 1990 hearing, dated June 4, 1990.

APPENDIX I
Rules, Statutes & Codes

APPENDIX J

Cases

APPENDIX K

Other Authority

APPENDIX A

Constitution of the United States
AMENDMENT 14

§ 1. Citizenship - Due process of law - Equal protection. -- All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction of the equal protection of the laws.

United States Code

U.S.C.§ 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before of after rendition of judgement or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

(June 25, 1948, ch. 646, § 1, 62 Stat. 928; June 27, 1988, P.L. 100-352, § 2(a), (b), 102 Stat. 662.)

U.S.C. § 1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute or the United States is drawn in question on the ground of its being repugnant to the Constitution or the treaties or is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States. (b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.(June 25, 1948, ch. 646, §1, 62 Stat. 929; July 29, 1970, P.L. 91-358, Title I, Part D, Subpart 2, § 172(a)(1), 84 Stat.590; June 27, 1988, P.L. 100-352, § 3, 102, Stat. 662.)

APPENDIX B

FILED: October 26, 1993

OPINION ON TRANSFER

SUPREME COURT OF INDIANA

No. 82S04-9310-CV-1177

Transfer from No. 82A04-9008-CV-372
in Court of Appeals

REBECCA BOOSTROM,
Appellant (Plaintiff Below),

v.

STEPHEN BACH,
Appellee (Defendant Below).

APPEAL FROM THE VANDERBURGH SUPERIOR COURT
SMALL CLAIMS DIVISION
The Honorable Donald R. Vowels,
Judge Pro Tempore
Cause No. 82D06-9002-SC-819
On Petition for Transfer

SHEPARD, Chief Justice.

We grant transfer to consider whether the statute of limitations is tolled when a complaint is tendered to the clerk, but the prescribed filing fee is not. We hold that

it continues to run. Appellant Rebecca Boostrom attempted to commence an action in small claims court against her former attorney Stephen Bach on January 12, 1990, the same day the statute of limitations was to run on her right of action. Boostrom mailed her complaint to the clerk of the Vanderburgh Superior Court by certified U.S. Mail return receipt requested. She did not include the small claims filing fee. When Boostrom's complaint was received, the clerk did not file-mark it. Instead, the clerk dispatched a letter to Boostrom on January 17th informing her of the need to remit the fee. Boostrom complied on February 5th, and her complaint was file-marked as of that date.

Defendant Bach moved for summary judgment, arguing among other things that Boostrom's action was barred by the statute of limitations. Boostrom responded with "Motion to Correct Minutes" whereby she sought to have her complaint marked as having been

filed on January 12th rather than on February 5th. The trial court denied Boostrom's motion, adjudged her action barred by the statute of limitations, and entered summary judgment for Bach on that ground. The Court of Appeals reversed, holding that an action commences for statute of limitations purposes when the complaint is tendered to the court in accordance with the filing requirements of Ind. Trial Rule 5(E). Boostrom v. Bach (1992), Ind.App., 589 N.E.2d 275, on reh'g, 603 N.E.2d 867. We disagree.

The applicable statute of limitations, Ind. Code Ann.§ 34-1-2-2 (West 1983), dictates that after a cause of action has accrued, an action must be commenced within the period therein prescribed and not afterwards. Under Ind. Small Claims Rule 2(A), a small claims action is commenced "by the filing of an unverified notice of claim in a court of competent jurisdiction." This language tracks that of T.R. 3, which provides: "A civil action is commenced by

filing a complaint with the court or such equivalent pleading or document as may be specified by statute." Accordingly, whether or not Boostrom's action is saved depends on whether her notice was "filed" within the prescribed period. We therefore must determine when a notice is filed under S.C.R. 2(A).

Boostrom argues that the answer to this question is found in T.R. 5 (E). The Indiana Trial Rules govern small claims proceedings to the extent that they are not inconsistent with the Small Claims rules. Meunich v. Gulden (1991), Ind. App., 579 N.E. 2d 665. Trial Rule 5 (E), entitled "Filing with the Court Defined," provides that the "filing of pleadings, motions, and other papers with the court as required by these rules" may be made by mailing to the clerk via registered or certified mail return receipt requested, and that filings so made "shall be complete upon mailing." Boostrom argues that this rule, read in conjunction with S.C.R. 2 (A), leads

to the conclusion that a small claims action is commenced when a notice of claim is mailed to the clerk.

This view misapprehends the significance of T.R. 5 (E), which only defines how a required filing may be made. Thus, while the Court of Appeals was correct in saying that the filing of a notice of claim may occur by certified mail return receipt requested and that the filing is complete upon mailing, it does not necessarily follow that an action is commenced by mailing only the notice.

Boostrom's attempt to bolster her position by drawing an analogy to our holding in Brady v. Eastern Ind. Prod. Credit Ass'n (1978) , Ind. App., 396 N.E. 2d 335, is not well taken. In Brady we held that the failure to tender the requisite fee did not deprive the Court of Appeals of jurisdiction to hear an appeal where the record was timely filed. This holding was grounded on the brief that appeals ought to be disposed of on the merits whenever possible, Brady, 396 N.E. 2d at 335, .

and that there are numerous methods by which to enforce effectively the payment of filing fees other than by couching such enforcement in jurisdictional terms. Id.; Brady v. Eastern Ind. Prod. Credit Ass'n (1977), Ind. Ap., 360 N.E. 2d 1267, 1269 (Sullivan, J., dissenting). Hinging commencement of an action under T.R. 3 to the payment of filing fees is one such method. Moreover, this Court's desire to dispose of appeals on the merits whenever possible does not displace the legislative policy which undergirds the statute of limitations. The Brady court rightly concluded that prepayment of the appellate filing fee was neither required by the statute then controlling[1] nor central to accomplishing the objectives of the rules which govern submission of appeals. Those rules exist to facilitate the orderly

[1] The controlling statute in the case at bar, Ind. Code Ann. § 33-19-5-5 (West Supp. 1992) provides that 'for each small claims action the clerk shall collect from the party filing the action a small claims costs fee of thirty dollars ($30).' We agree with the Court of Appeals that neither this provisions nor the raft of other statutes cited by the parties is dispositive of the issue before us.

presentation and disposition of appeals and prevent the confusing and awkward situation of having the trial and appellate courts simultaneously review the correctness of a judgment. Coulson v. Indiana & Michigan Elec. Co. (1984), Ind., 471 N.E.2d 278.The filing of a praecipe and subsequent presentation of the record fully safeguard these interests. On the other hand, the statute of limitations exists not only to spare courts from stale claims, Matter of M.D.H. (1982), Ind.App., 437 N.E.2d 199, but also "to insure that parties are given formal and seasonable notice that a claim is being asserted against them." State ex rel. Young v. Noble Circuit Court (1975), 263 Ind. 353, 359, 332 N.E. 2d 99, 103.

Tendering the prescribed court costs fee is relevant as to this latter objective. Cf. Ind. Code Ann.§ 33-19-3-5 (West Supp. 1992) (costs fee include cost of initiating service of process). Therefore, while we agree that "the filing of the complaint will toll the

statute of limitations," Civil Code Study Commission, Comments to Trial Rule 3, reprinted in 1 William F. Harvey, Indiana Practice 60 (2d ed. 1987), we also conclude that a notice of claim or complaint is not filed" unless the filing of the fee and the notice/complaint have occurred by any of the means permitted by T.R. 5(E).

Such an approach is consistent with the modern notion that the commencement of an action occurs when the plaintiff presents the clerk with the documents necessary for commencement of suit. See State ex rel. Long v. Marion Super Ct. (1981), 275 Ind. 533, 418 N.E.2d 218. Former practice dated commencement from the day the sheriff received the summons for service. Marshall v. Matson (1908), 171 Ind. 238, 86 N.E. 339; see also Jensen v. Fagan (1964), 138 Ind.App. 679, 685, 199 N.E. 2d 716, 719 (statute of limitations not tolled until clerk prepares and has "parted with the summons" by mailing it to sheriff). The former rule was

abandoned out of concern over the "significant amount of time" which could elapse between the completion of all the plaintiff's tasks which were necessary for the commencement of an action and the preparation of the summons by the clerk. See Civil Code Study Commission, supra. Payment of the filing fee, unlike issuance of summons by the clerk, is wholly in the hands of the plaintiff.[2]

The Court of Appeals observed that Boostrom's position is supported by the case law of other jurisdictions including some interpretations of Fed. R. Civ. P. 3.[3] Federal precedent upon this question was unsettled at the time we adopted T.R. 3, however, and continues to be so. See 2 James W. Moore et al., Moore's Federal Practice (para. 3.04, 3-16 & nn.5-6(2d ed.

"[2] The plaintiff, of course, controls the presentation of all the documents necessary to commencement of a suit: the complaint, the summons, and the fee. Boostrom used a standard pre-printed small claims form, which contains the complaint and the summons on a single page. She thus filed two of the three items necessary to commencement of her action.

[3] Rodgers on Behalf of Jones v. Bowen, 790 F.2d 1550 (11th Cir. 1986); see also Johnson v. Brown, 803 F. Supp. 1414 (N.D. Ind. 1992)

1993). Moreover, the principal Supreme Court opinion relied upon by those federal cases in accord with the Court of Appeals is Parissi v. Telechron, Inc., 349 U.S. 46 (1955) (per curiam). Like Brady, that opinion turned on perfecting an appeal and is, we think, equally distinguishable. Finally, we note that our holding today is consistent with that to other jurisdictions which have borrowed from Fed. R. Civ. P. 3. See, e.g., Mace v. Centel Business Sys., 549 So.2d 70 (Ala. 1989).

Conclusion

The filing of Boostrom's small claims fee did not occur until after limitation period had run. As such, her complaint was not filed within the prescribed period and is barred. The order entering summary judgment in favor of defendant Bach is affirmed.

DeBRULER, AND DICKSON, JJ., concur.
KRAHULIK, J., concurs in result.
GIVAN, J., dissents with separate opinion.

GIVAN, Justice. -- Dissenting

I respectfully dissent from the majority opinion in this case. I do not agree that the rules cited by the majority require the paying of a filing fee in order to constitute a filing within the statute of limitations. I believe the Court of Appeals opinion reported at Boostrom v. Bach (1992)-, Ind.App., 589 N.E.2d 275, on reh'g, 603 N.E.2d 867, is correct in stating: "[T]here is no statute stating that fees must be paid in advance before complaints will be deemed 'filed.'" Id. at 869.

I would deny transfer in this case.

APPENDIX C

Filed February 23, 1994

DENIAL OF PETITION FOR REHEARING

SUPREME COURT OF INDIANA

CAUSE NUMBER 82S04-9310-01177

BOOSTROM, REBECCA VS BACH, STEPHEN

Appellant's Petition for Rehearing of Petition to Transfer is Hereby Denied.

RANDALL T. SHEPARD, CHIEF JUSTICE.

DEBRULER, GIVAN, DICKSON, AND SULLIVAN, J.J., CONCUR.

APPENDIX D

Filed April 6, 1992

OPINION ON REMAND

No. 82A04-9008-CV-372

Court of Appeals of Indiana,
Fourth District.

Rebecca BOOSTROM, Appellant-Plaintiff,

v.

Stephen BACH, Appellee-Defendant.

CHEZEM, Judge.

Case Summary

Plaintiff-Appellant, Rebecca Boostrom, appeals from the summary judgment granted for Defendant-Appellant, Stephen Bach. We reverse and remand.

Issue

Boostrom presents three issues for our review; however, because we reverse, we only

need to address the following:

Did the trial court err when it refused to order that the Complaint, which was not accompanied by a filing fee, be file-marked the date of its certified mailing?

Facts and Procedural History

On January 12, 1990, Boostrom sent her Complaint against attorney Stephen Bach by certified mail to the Vanderburgh Small Claims Court. The Complaint alleged legal malpractice and breach of contract. Bach had previously represented Boostrom; however, he withdrew from representing her on January 19, 1988.

The Clerk did not file the Complaint on January 12, 1990 because Boostrom failed to enclose the $30 filing fee. Instead, the Clerk sent a letter to Boostrom on January 17, 1990, stating "[w]e must have a $60.00 Money Order for these (2) Small Claims cases." Thereafter, Boostrom sent the filing fees to the Clerk, and the Complaint was file-marked "February 5, 1990."

On April 24, 1990, Bach filed his Motion for Summary Judgment, alleging in part that Boostrom failed to file the Complaint within the two year statute of limitations. Boostrom then filed her Motion to Correct Minutes, alleging the Complaint should have been file-marked on the date of certified mailing, or January 12, 1990. She attached thereto copies of the certified mail receipt, proposed minute entry, and Clerk letter of January 17, 1990.

The trial court held a hearing on both motions on June 4, 1990.[1] At the conclusion of the hearing, the court held:

> Okay, I'll make a determination on that date. Show that the Motion to Correct Minutes is denied; that the filing--the record will reflect that Mrs. Boostrom has had numerous contacts with the Clerk's Office with reference to previous filings in this County and is well aware of the rules requiring a filing fee; that she has stated that no filing fee was filed whatsoever and the January 12th date does not go into effect

[1] Both parties mischaracterize the nature of this hearing. On March 13, 1990, the trial court clearly stated that all other motions "to be filed" were set for hearing on June 4, 1990.

because even though it was mailed by certified mail, it still was not perfected because there was no filing fee included. Therefore, the Court determines that the filing date was the date of the second mailing, which falls outside of the statute of limitations which tolled and ended on January 12th, 1990. Mr. Bach, you have a Motion for Summary Judgement based upon [the] failure to perfect filing in the suit within the necessary statute of limitations. We'll show the Motion for Summary Judgement is granted and that takes care of the case.

Discussion and Decision

Boostrom argues that "the lower court errored [sic] by law in denying the Motion to Correct Minutes of the file-mark date of the [C]omplaint, which was file-marked the date of late payment of the filing fee, instead of the date of certified mail filing of the Complaint." We agree.

[1] Of course, the law is well-established that a complaint is considered "filed" on the date it is sent by certified mail. As noted in Indiana Trial Rule 5(E)(2):

> (E) *Filing With the Court Defined.* The filing of pleadings and papers with the court as required by these rules shall be made by one of the following methods:
>
> * * * * * * * * * *
>
> (2) Mailing the papers to the clerk by

registered or certified mail return receipt requested;

* * * * * * *

Filing by registered or certified mail shall be complete upon mailing.

Further, a complaint is a "pleading" or "paper" subject to the filing provision of T.R.5(E)(2). *Chambers v. Estate of Market* (1979) , Ind. App. 397 N.E. 2d 636, 637. A complaint is "filed" for limitations purposes when it is properly mailed in accordance with T.R. 5 (E)(2). *Id.* We have also stated that 'any and all filings may be accomplished by mailing the matters to be filed to the clerk of the court by registered or certified mail, return receipt requested, and the filing is accomplished upon deposit in the mail." (*Seastrom, Inc. v. Amick Construction Co., Inc.* (1974), 159 Ind. App. 266, 306 N.E. 2d 125, 127.

[2] Here, the Complaint should have been filed-marked the date it was sent by certified mail--January 12, 1990. There is no statute, rule or case law stating that

filing fees must be paid in small claims courts before complaints will be filed. Indeed, the pertinent statute is silent in this respect:

> *Small claims costs fee.*
>
> (a) Except as provided under subsection (b), for each small claims action the clerk shall collect from the party filing the action a small claims costs fee of thirty dollars ($30). Ind. Code § 33-19-5-5.

Moreover, while there are no cases directly on point, we find to be instructive the case of *Brady v. Eastern Indiana Production Credit Association* (1978), Ind., 396 N.E. 2d 335. There, the record for the appeal was timely filed, but the filing fee was late. Consequently, the appeal was dismissed. On transfer, the dismissal was reversed by the Indiana Supreme Court, which stated as follows:

> It is hereby directed that the case of *Brady v. Eastern Indiana* Production Credit Assoc. (1977), Ind. App., 360 N.E. 2d 1267, be remanded to the Court of Appeals for consideration of the merits.
>
> This Court finds the reasoning of the dissent more in line with our stated policy to reach the merits of a case whenever possible. Additionally, this

> court relies on the case of *Peters et al. v. Poor Sisters of Saint Francis Seraph of the Perpetual Adoration Society*, Ind. (1971), 257 Ind. 360, 274 N.E. 2d 530, wherein this Court, under the former transfer filing fee statue, held the untimely receipt of the fee by the Clerk was not grounds for dismissal where the petition to transfer was timely filed. Thus, in applying the reasoning of *Peters, supra*, to this case we believe the untimely payment and receipt of the filing fee should not be grounds for automatic dismissal where the record is timely filed, as here.
>
> *Brady*, 396 N.E. 2d at 335 [citations omitted].

We also note our decision here is supported by case law in other jurisdictions. In *Rodgers on Behalf of Jones v. Bowen* (11th Cir. 1986), 790 F.2d 1550, 1552, the Eleventh Circuit Court of Appeals stated:

> We therefore hold that a complaint is 'filed' for statute oflimitations purposes when it is 'in the actual or constructive possession of the clerk,' regardless of the untimely payment of the required filing fee.
>
> * * * * * *
>
> Nevertheless, the severe sanction of dismissal should be imposed 'only in the face of a clear record of delay or contumacious conduct by the plaintiff.'
> [Citations omitted]

In *Matter of Estate of Crane* (1976), 15 Wash.App. 161, 548, P.2d 585, 586, the

Washington Court of Appeals stated:

> The sole issue [here] is whether timely payment of the superior court clerk's filing fee is a jurisdictional requirement for commencement of a will contest. We hold that it is not and reverse the trial court's order dismissing the petition to revoke the will of Edna Crane.

In *Hanks v. Floyd* (1977), 51 Ill.App.3d 1048, 10 Ill.Dec. 95,96, 367 N.E.2d 483, 484, the Illinois Court of Appeals stated:

> The sole issue to be decided is whether payment in advance of the filing fee is a condition precedent to the 'filing of a complaint,' for the effect of the trial court's order of dismissal was to hold that it is. Although by statute the fees of the clerk of the circuit court 'shall be paid in advance,' this language has been interpreted to be merely directory, not mandatory. In *Elles v. Industrial Comm.* (1940), 375 Ill. 107,30 N.E.2d 615, the plaintiff sought to appeal a decision of the Industrial Commission to the circuit court. However, the plaintiff sought to appeal a decision of the Industrial Commission to the circuit court. However, the plaintiff did not pay the filing fee. The clerk of the circuit court filed the action even though a statute provided that fees of the clerk 'shall be paid in advance.' The supreme court held that the statute was merely directory to the clerk and that the failure to pay the filing fee did not deprive the circuit court of jurisdiction.
>
> * * * * * *
>
> Accordingly, the order of dismissal of complaint is reversed, and the cause is remanded for further proceedings.

[3] In the present case, the court acquired jurisdiction when the Complaint was sent by certified mail to the Clerk on January 12, 1990. The Clerk then properly notified Boostrom that she had failed to enclose or pay the required filing fee. Boostrom then paid the fee on February 5, 1990. The Complaint should have been file-marked "January 12, 1990."

Reversed and remanded.

MILLER AND GARRARD, JJ., concurring.

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[2] We recognize the additional bookkeeping and administration burdens this decision may impose upon court clerks. Nevertheless, in cases where filing fees are not paid, we suggest the clerk notify the trial court so the case may be held in abeyance until the required sum is paid. We note the trial court may order that the filing fee be paid before proceeding in the matter. If a party fails to comply, the court may then impose the sanction of dismissal.

APPENDIX E

OPINION ON PETITIONS FOR REHEARING

Filed: November 23, 1992

Court of Appeals of Indiana

Fourth District

Cause No. 82A04-9008-CV-372

REBECCA BOOSTROM,

Appellant-Plaintiff,

vs.

STEPHEN BACH,

Appellee-Defendant

(Caption Omitted in Printing)

CHEZEM, J.

ON PETITIONS FOR REHEARING

Defendant-Appellee, Stephen Bach ("Bach"),

contends that we erred in our published opinion reversing the trial court's entry of summary judgment granted in his favor. See, Boostrom v. Bach (1992), Ind. App., 589 N.E.2d 275. In particular, he argues that statutory law requires prepayment of filing fee in small claims cases; that there was no competent or admissible evidence submitted in opposition to his summary judgment motion; and there was a complete failure of proof as to the damage element of the legal malpractice claim brought by Plaintiff-Appellant, Rebecca Boostrom ("Boostrom").

I

[1] Bach first argues that "[our] opinion incorrectly decided that there is no statute stating that filing fees in small claims courts are to be paid before complaints will be filed." He cites, on rehearing, different statutes than he relied upon in his initial appeal to this Court. Bach now cites Ind. Code §33-11.6-4-15 (which he concedes does not apply to the small claims court involved

in this case), which states in part that '[t]he docket fee and the cost for the initial service of process shall be paid upon the institution of each case.' He thus concludes that our opinion is 'in direct conflict with the intent of the legislature.' We disagree.

This newly cited statute requires fees to be paid upon the 'institution' of the case. In This respect,' institution' means at the start of or commencement of an action. See, Black's Law Dictionary (5th ed. 1979). Bach erroneously interprets the word 'institution' as meaning 'prepayment.' We note that 'prepayment' means to pay in advance, not at the start or commencement of an action. Id.

[2] Furthermore, this statute does not state that the fees must be paid before the complaint will be filed. Thus, we once again note that there is no statute stating that fees must be paid in advance before complaints will be deemed 'filed.' In addition, we are not persuaded by the other

statutes cited by Bach.

II

Bach next argues "[t]here was no competent, admissible evidence submitted by Rebecca Boostrom in opposition to the Motion for Summary Judgement." In particular, he argues:

> On May 11, 1990, Boostrom filed a Motion to Correct Minutes requesting that her Complaint be file-stamped on January 12,1990, instead of February 5, 1990. This Motion to Correct Minutes was not a verified motion. It was not sworn to in any way. The exhibits attached to the Motion to Correct minutes were also not authenticated or sworn to in any way, and Boostrom was not under oath on June 4, 1990, when the court heard both motions. This Court could therefore not consider this inadmissible evidence.

The parties in this case were in small claims court. Thus,the proceedings were informal, and the parties were not bound to follow the rules of evidence. As stated in Indiana Small Claims Rule 8(A):

> The trial shall be informal, with the sole objective of dispensing speedy justice between the parties according to the rules

> of substantive law, and shall not be bound by the statutory provisions or rules of practice, procedure, pleadings or evidence except provisions relating to privileged communications and offers of compromise.

[3] Bach makes the argument that, while the rules of evidence may not be binding at a trial in small claims court, the rules are binding at a summary judgment hearing in small claims court. We disagree. We have indicated previously that Rule 8(A) may apply to summary judgment proceedings in small claims courts. Bedree v. Sandler & Sandler (1981), Ind. App., 426 N.E.2d 707. In Bedree, while discussing whether summary judgments were appropriate in small claims actions, this Court stated that "Small Claims Rule 8 concerns itself with the informality of the actual hearing of trial." Id.

Furthermore, the rules clearly state that parties should be able to represent themselves in small claims courts. As noted in I.C. § 33-11.6-4-6, " A simplified procedure shall be established by rule to enable any person to

file the necessary papers and present his case in court either to seek or to defend against a small claim without consulting or being represented by an attorney." This very purpose would be defeated by requiring a formal summary judgment hearing at which the parties were bound by, and required to follow, the rules of evidence. Indeed, applying the rules of evidence at summary judgment but not at trial would create an opportunity for those represented by counsel to take advantage of those who are not.

[4] Accordingly, we disagree with Bach's contention that there is no competent or admissible evidence in the record opposing his summary judgement motion. Boostrom's exhibits included copies of receipts for certified mail indicating the Complaint was sent to the small claims court and Bach on January 12, 1990; a copy of a proposed minute entry stating that Boostrom filed her Complaint on January 12, 1990; a copy of a letter, dated January 17, 1990, from the clerk

(Betty K. Smith) and deputy (Virginia L. Seybold) to Boostrom indicating that they needed $60 in filing fees from Boostrom; a copy of the envelope which had contained the clerk's letter to Boostrom, dated January 17, 1990. This admissible evidence supported the decision we originally rendered in this case.

III

Bach next argues that we should have nevertheless affirmed the summary judgment on his alternative theory that there was a complete failure of proof as to the damage element of the legal malpractice claim. In particular, he argues:

> Bach presented uncontroverted evidence that the withdrawal of his representation of Boostrom was accomplished without adverse effect to her. He therefore negated an essential element of the cause of action for attorney malpractice -- damage.

Bach withdrew his representation of Boostrom citing Rule of Professional Conduct 1.16(b), which states in part that "a lawyer may

withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client." The trial court allowed the withdrawal, finding no adverse effect on Boostrom.

[5,6] The mere fact that an attorney can withdraw his representation without adverse effect on his client does not also establish that there has been no legal malpractice. For instance, a lawyer can withdraw during the discovery phase of a breach of contract case (without adverse effect on his client), and yet have committed malpractice by failing to timely plead or file (with the statute of limitations) his client's additional claim for negligence against the defendant.

Moreover, the small claims court never addressed the damage issue at the summary judgment hearing because it determined that the case was barred by the statute of limitations. Boostrom was unable to present any argument or evidence on the damage issue

because the court granted Bach's summary judgment motion after hearing arguments only as to the statute of limitations issue. The court never reached the damage issue.

Petition denied.

IV

We next address Boostrom's Petition for Rehearing and Motion to Correct Error on the Motion for Consolidation ("Boostrom's Petition"), and Bach's Motion to Strike [Boostrom's Petition].

Boostrom argues that we abused our discretion in denying her request for consolidation on March 30, 1992, and the trial court likewise abused it discretion in denying her request for consolidation filed in the case of Boostrom v. Sheets. Boostrom states that "[we] might want to give an opinion in [sic] rehearing that the decision for consolidation should be made in the lower court" and that we should "order the lower

court to hold an evidentiary hearing" on consolidation.

We note the arguments and authorities cited by the parties and hereby deny Boostrom's Petition.

MILLER, J., and GARRARD, JJ., CONCURRING.

APPENDIX F

SMALL CLAIMS COURTROOM VERBATIM RULING

"BY THE COURT: Okay, I'll made a determination on that date. Show that the Motion to Correct Minutes is denied; that the filing--the record will reflect that Mrs. Boostrom has had numerous contacts with the Clerk's Office with reference to previous filings in this County and is well aware of the rules requiring a filing fee; that she has stated that no filing fee was filed whatsoever and the January 12th date does not go into effect because even though it was mailed by certified mail, it still was not perfected because there was no filing fee included. Therefore, the Court determines that the filing date was the date of the second mailing, which falls outside the statute of limitations which tolled and ended on January 12th, 1990. Mr. Bach, you have a

Motion for Summary Judgement based upon failure to perfect filing in the suit within the necessary statute of limitations. We'll show the Motion for Summary Judgement is granted and that takes care of the case."

(Verbatim courtroom ruling,June 4, 1990, Record, Transcript, p.116-117)

APPENDIX G

SUMMARY JUDGEMENT

Filed: June 4, 1990

STATE OF INDIANA

COUNTY OF VANDERBURGH

VANDERBURGH SUPERIOR COURT

SMALL CLAIMS DIVISION

Cause No. 82D06-9002-SC-819

Rebecca Boostrom,
Plaintiff

VS.

Steve C. Bach,
Defendant

SUMMARY JUDGMENT

Comes now the plaintiff, Rebecca Boostrum, in person Pro Se, and the defendant, Steve C. Bach, in person Pro Se, for hearing on the Defendant's Motion for Summary Judgment, and the Court being duly advised in the premises,

and having heard the evidence in support of said motion, now finds that there is no genuine issue of material fact regarding this cause of action, and that the law is with the defendant and against the plaintiff on all issues presented by the plaintiff's complaint and amended complaint, and that the defendant is entitled to summary judgment as a matter of law.

IT IS THEREFORE CONSIDERED, ORDERED, ADJUDGED AND DECREED that:

1. This action was filed on February 5, 1990, and was filed more than two years after all alleged acts of malpractice occurredupon which the plaintiff bases her action herein: that the plaintiff has no valid excuse for not filing her action before said date.

2. That all of the acts alleged in plaintiff's complaint or amended complaint are for malpractice and come within the provisions of Indiana Code Section 34-1-2-2 (1).

3. That the plaintiff has no claim for breach of contract in her complaint or amended complaint other than for said alleged acts of malpractice and no damages are alleged for breach of contract that are not barred by said statute of limitations.

4. That as a result of this action being barred by said statute of limitations the plaintiff shall take nothing by her complaint or amended complaint.

/s/ Illegible

_____

Judge, Vanderburgh Superior Court, Small Claims Division

I HEREBY CERTIFY THAT A TRUE COPY OF THE ABOVE AND FOREGOINGHAS BEEN FORWARDED TO, Rebecca Boostrum, Plaintiff, at 750 Walker #118, Bloomington, IN 47403, THIS 7th day of June, 1990.

/s/ Steve C. Bach

_____

Steve C. Bach, Defendant & Attorney
P.O. Box 592
Mt. Vernon, IN 47620
(812) 838-0043

PUBLISHER'S NOTE:

Page(s) 39 missing in original.

RELEVANT PORTIONS OF TRANSCRIPT

(Side captions omitted for printing)

June 4th, 1990

[R73] BY THE COURT: Okay, I'll have to read through these.

MR. BACH: Judge, there is a petition for transfer to Superior Court. I thought this was Superior Court, but--

MRS. BOOSTROM: Well, I would like to say something first, if you don't mind. I'm the plaintiff.

BY THE COURT: Just a moment.

MR. BACH: I'm addressed the Court. I assume that I have a right to speak.

MRS. BOOSTROM: Well, this has to do with the possible disqualification of the Judge.

* * * * *

(Omitted for printing is discussion [R73-75] on possible disqualification of Judge Donald Vowels, Pro Tempore)

[75] BY THE COURT ... but I have no specific recollection of any particulars of

that case, so I'm not going to recuse myself. Alright, the--

MR. BACH: Judge, can I make one remark?

BY THE COURT: Yes, sir.

MR. BACH: Mrs. Boostrom today filed a Petition to Transfer. I assume she is wanting it to be out of Small Claims Court.

BY THE COURT. Uh-huh.

MR. BACH: And I would appreciate it is the Court could hear that first because I don't think the Court will sustain it under the authority I've got, but if the Court did, then there would be no need for the Court to hear the remainder of the matter here today.,

BY THE COURT: Okay.

MRS. BOOSTROM: I would like to say something since I'm the plaintiff. I would like the Court to hear today the Motion to Correct Minutes because that affects the statute
of limitations and I would also like to hear-- a Court to hear a partial summary judgment of his regarding the statute of limitations--

BY THE COURT: The motion--

MRS. BOOSTROM: --before the transfer because he made me come all the way down here from Bloomington although he knew I didn't have any money for gas and had to borrow it.

(Omitted for printing is discussion [R76-85] initiated by Bach about Mrs. Boostrom's personal involvement in two other prior actions in which Mrs. Boostrom was heir or party.)

[R86] MRS. BOOSTROM: Your Honor, I did borrow money to come down here. Could we at least correct the Court minutes first so at least we can get something on the record for all my time and expense in coming, if you don't mind.

BY THE COURT: What's the need for the correction? Okay, the Motion to Correct Minutes--

MR. BACH: Judge, I think the transfer comes first because certainly, I'm sure that we will be able to meet that, but I thought the Court maybe to expedite matters would rather hear the transfer petition first.

BY THE COURT: Okay, let me just see about that.

MR. BACH: Now, if she want to--

MRS. BOOSTROM: Well, Mr. Bach, I'm the plaintiff.

MR. BACH: If she wants to submit that, I'll be happy to submit that, Judge--

MRS. BOOSTROM: I'm the one--I'm the one who you made drive all the way down here.

MR. BACH: -- because I don't think she ever got into **[R87]** Court.

BY THE COURT: Okay, Mrs. Boostrom--

MR. BACH: And if she wants to submit it on the merits, I'm in favor it.

BY THE COURT: Okay, what is your Motion to Correct Minutes? Explain that to me.

MRS. BOOSTROM: Well, this is important because it deals with the statute of limitations.

BY THE COURT: Okay, specifically, what is it that we're talking about.

MRS. BOOSTROM: Can you find your copy of it there?

BY THE COURT: There's a lot of things here. It's a matter of finding it. Why don't you briefly summarize what it is.

MRS. BOOSTROM: Well, it's just to correct the file date and I brought another copy of it. But I don't have a copy of my motion.

BY THE COURT: Okay, I have a copy of it. I found it.

MRS. BOOSTROM: Oh, you found it? Okay.

BY THE COURT: I found it.

MRS. BOOSTROM: It was filed by certified mail, but the **[R88]** clerk didn't show the date of completion by mailing by certified mail. She showed a date after the payment because they asked me to send a money order.

THE COURT: Rather than a check?

MRS. BOOSTROM: Uh-huh.

MR. BACH: Your Honor, if she's going to claim payment at the time she submitted that complaint, I have two witnesses to call from the Clerk's Office that would state that she did not file any--any that's the very basis of the motion claiming the statute of limitations

has run because she did not pay any filing fee at the time that the case was filed and I have two witnesses up in the Clerk's Office.

MRS. BOOSTROM: Well, I thought that I had sent a check, but it doesn't matter. This is the exhibit I would like to file. You can perfect your claim after you file it.

MR. BACH: No, you cannot. That's the very problem.

[R89] MRS. BOOSTROM: This is Indiana Forms of Pleading and Practice Trial Rule 1, NO. 3.08. It states: As noted above, an action shall be deemed commended when the complaint is filed with the Clerk, even though summons has not being used or the filing fees paid. What then if a plaintiff refuses or fails to cause summons to be issued or to pay the filing fee within a reasonable time after filing the complaint? I did pay the filing--

MR. BACH: Is that Indiana authority?

MRS. BOOSTROM: Yes, I just--

MR. BACH: That's the old one then.

MRS. BOOSTROM: Also, here is another exhibit, 1989 supplement--

MR. BACH: Well, this is not Indiana authority. This is--

BY THE COURT: Some pleading and practice--

MRS. BOOSTROM: That is from Indiana forms. This other case is 1989 supplement, Volume 1, Indiana

[R90-91] PLAINTIFF'S EXHIBIT NO. 2, OFFERED INTO EVIDENCE:

[R92] MRS. BOOSTROM: Forms of Pleading and Practice. This is Indiana Appellate Court, 1979, in Chalmers vs. Estate of Market, 397 N.E. 2nd 636. The complaint was mailed by registered mail before the statute of limitation had run, but was not actually received and filed marked by the Court Clerk until after the statute had run. The Trial Court held the filing was complete upon mailing, relying upon Trial Rule 5(e) and refused to hold the action barred by the statute of limitations. So by all of these cases, the filing was complete upon mailing by certified mail and not--it was perfected when

the money order was sent, but the date of the file mark should be the date of certified mailing according to the law.

MR. BACH: Your Honor, this is under Federal Trial Rule 41 which has culpatory provisions here and **[R93]** this is not the law where the Legislature had made it mandatory that the filing fee be paid at the time that the complaint is filed and I have direct authority on that and a very good case which I have already submitted. Here's the statutory provisions too and here's the case and it says and it gives a very good reason why that filing fee must be paid in advance.

MRS. BOOSTROM: That is not required by the Indiana Appellate Court because in my case with Mr. Sheets, the filing fee was not paid until after I filed it and they still backdated the file mark date.

MR. BACH: I don't know what the circumstances were with Mr. Sheets, but that's not authority for this case.

MRS. BOOSTROM: Well, I know that is the practice of the Appellate Court in Indiana because that's what they did.

MR. BACH: This is a matter of limitations, Your Honor, **[R94]** it is not a matter of whether or not she's got a right to be in Court if she's within the statute of limitations. But I would like to argue that, if I could, please. Now, in fact, the Legislature has provided in those statutes that I have cited to the Court there, given the Court copies of them, that the plaintiff at the time that she files her complaint shall pay the court costs. Now, that's not the Indiana Supreme Court or the Rules of Procedure, that is what the Legislature has sent down as a requirement and that was tested in the Connecticut case which I cited to the Court. In that case, there were people that could legitimately claim that there were paupers, but the Court did not permit it and that's the only case I've found. This case here was just submitted to me today, but I think there will be some distinctions. I

don't think that comes under the recent statute passed by the Legislature. **[R95]** But the Court in that Connecticut case says there's two principal reasons for requiring that; that the Legislature has a legitimate reason for requiring that the--that the Legislature has a legitimate reason. One is that a party cannot just go out like a shotgun and shoot everybody on the block. That's one of the reasons. And the other is because it is a proper function to use costs to pay the expenses of the Court and the Court has--I mean the Legislature has a legitimate reason for requiring tat fee in advance.

MRS. BOOSTROM: I would like to answer Mr. Bach's argument. I am an English teacher certified by the State of Indiana to teach English. The word shall doesn't mean that you have to do it in advance, but it just means in this case that you must do it.

MR. BACH: It says, I believe, that--

MRS. BOOSTROM: Excuse me, Mr. Bach, I'm speaking.

[R96] MR. BACH: Well, I thought you were through.

MRS. BOOSTROM: No, I haven't sat down. And shall in some legal terminology also does not mean in the future, which could mean, if you want to say shall means in the future, it could mean after you file it then you shall pay the filing fee, if you want to use shall in the future tense, but shall here just means must and the--I have already submitted Trial Rule 1 from Indiana Forms and Practices where when it says you shall, it can be done within a reasonable amount of time to perfect your complaint. And that's the meaning of shall. And also, a complaint is considered complete when mailed by registered mail and it doesn't say here that the filing fee has to be sent at that time. But the filing fee does have to be paid, otherwise it can be thrown out for lack of prosecution by Trial Rule 41, which is not because it had to be paid at the time, **[R97]** but because you can't proceed with the case if it's never paid.

BY THE COURT: What's the time frame on the statute of limitations that we're talking about?

MR. BACH: Two year statute, Your Honor.

BY THE COURT: I mean from when would it have tolled?

MR. BACH: It would have tolled I believe the 19th of January that the Court permitted me to withdraw.

BY THE COURT: Of 1988, okay.

MR. BACH: And under my affidavit I state there were no services performed after that time and the Court--actually the Court is aware of the fact even if the statute of limitations had not run then, which it had, everything would have run before that time because of the fact that she did not file until January the 5th. It may be better for me to bring the two deputies down here to show that she did not pay the court costs at the time. They did not file it at that time. They were under **[R98]** instructions from the State of Indiana not to accept for filing anything where the filing fee was not paid in

advance and they sent that back to her. It was never filed. The Court in its own--the only evidence before the Court here is the filing date on the complaint is February the 5th.

MRS. BOOSTROM: I would like to make an answer.

MR. BACH: She cannot--well, let me. One other thing I want to add.

MRS. BOOSTROM: Well, you have sat down.

MR. BACH: She cannot correct something, as she never arrived in the first place and she didn't.

BY THE COURT: Okay, ma'am?

MRS. BOOSTROM: It is not a matter of correcting this as it was a matter of perfecting my complaint and I have noticed before that the Clerks in this Court have never been instructed to file something according to the certified mail date. I have sent other petitions where a statute of limitation was **[R99]** not involved and the Clerks don't file it according to the certified mail date, so this is not used in

this Court as it is supposed to be by law. In Mr. Sheets' case, we had to correct three or four dates because the Clerks weren't dating the file mark according to the date that it was complete upon mailing by certified mail, so this is not correcting my fault, but it's correcting the practice in this Court where the Clerks have not been instructed. And I brought this to the attention of the Clerk of the Court one time because I am not a lawyer, but it has happened to me too many times, but she was a new clerk, so apparently she didn't pay too much attention to it because she had so many other things to learn. But this Court is not following that practice of using the date of the certified mail postmark and so I'm sure you're **[R100]** going to come across this again, but the Judge corrected a lot of dates for the file marked date and I do know in Mrs. Sheets' case, when it went to the Appeals Court, that I did not have the filing fee and they accepted my brief, but they did not file it until after the filing fee was paid through the motion to proceed in forma pauperis was

granted, then they changed the file marked date to the date that it was received, so this is the practice of the Indiana Appellate Court and I already gave a--not of federal cases, but Indiana cases on this.

MR. BACH: Your Honor, I wonder if we could get this 397 N.E. 2d. Mrs. Boostrom has also cited another authority which I'm going to show was reversed by the Supreme Court after the Appellate Court made the decision she cited. So I would like to see that because I just do not believe it. The Court will also notice there, I gave the **[R101]** Court a copy of that, 33-19-3-2. It says a person entitled to bring a civil action or petition for the appointment of a guardian under IC 29-3-5 may do so without paying the required fees or other court costs upon filing in court, under oath and in writing, a statement. In other words, to file, the wording of that statute indicates that she's not entitled unless she pays the court costs or she files an affidavit forma pauperis.

MRS. BOOSTROM: Your Honor, that is exactly what happened in the Appellate case with Mr. Sheets, but they dated the date prior to the time that I filed the Motion to Proceed in Forma Pauperis.

BY THE COURT: Okay. Let's take a short break. I want to look at this case and the Trial Rules.

MR. BACH: Yes, I would like to see that.

MRS. BOOSTROM: I would like to see what you're talking about, Mr. Bach.

[R102] MR. BACH: Well, you cited the case.

MRS. BOOSTROM: I mean where you said what I showed from Trial Rule 1 was reversed. I would like to see that. I haven't seen that. You said what I quoted was reversed.

MR. BACH: I didn't say anything was reversed

RECESS OF THE COURT.

[Caption omitted in printing]

MR. BACH: You've look over those two cases, haven't you judge?

BY THE COURT: Uh-huh.

MR. BACH: Yes.

BY THE COURT: I've read through the Chalmers case. Mr. Bach, the case that you were referring to, the second case, which case were you referring to? I've read the Connecticut case **[R103]** too.

MRS. BOOSTROM: Your Honor, I've found two more references.

BY THE COURT: Okay, you looked--what book do you have there, it is 1990?

MRS. BOOSTROM: Burns Indiana Statutes.

BY THE COURT: Did you run off those cases?

MRS. BOOSTROM: Yes, I did, except one. I didn't have--

MR. BACH: Your Honor, I wonder if copies could be made of that because--

MRS. BOOSTROM: --enough money.

MR. BACH: --I don't know what she's submitting.

MRS. BOOSTROM: Okay, this is from Indiana Forms of Pleading and Practice, Trial

Rule 1, when it is a complaint filed with the Court.

BY THE COURT: Okay, this is what you just brought me.

These Indiana Forms and Pleadings are not mandatory authority. The Thompson case would have been interesting.

MRS. BOOSTROM: And this is based on Trial Rule 3 for commencement of an action. I didn't have **[R104]** enough money to copy this page.

BY THE COURT: What happened to the rest of the balance of the twenty-seven thousand dollars that you got?

MRS. BOOSTROM: I'm supposed to get fourteen thousand later and I'll get about five hundred a year and I got some of it previously, as stated in my Motion to Proceed Pauperis [added for clarity: in the Sheets vs. Boostrom case previously alluded to] and some of it was in the form of household things.

MR. BACH: Your Honor, here is another authority too. That shows the general authority also that the fee is required in

advance. It must be paid, it's jurisdictional. And that's the federal authority. Now, where advanced costs are to be paid, that's entirely different than when a fee is required to be paid. Advanced costs just goes to the protection of the other party, but the fee goes to the operation of **[R105]** the Court and to prevent frivolous lawsuits.

BY THE COURT: Okay, Mrs. Boostrom, could I see--

MRS. BOOSTROM: Here's Trial Rule 3 for commencement of an action.

BY THE COURT: Okay, I have the same book here; I have the Annotated.

MRS. BOOSTROM: Okay.

BY THE COURT: Mrs. Boostrom, you have a--you're an English teacher?

MRS.BOOSTROM: Yes, sir.

BY THE COURT: You aren't employed though?

MRS. BOOSTROM: I am a graduate student at Indiana University, so I have--

BY THE COURT: How is it that you pay your tuition?

MRS. BOOSTROM: I have paid some of my own tuition and my aunt, before she got sick, paid some of my tuition.

BY THE COURT: What sort of degree are you going for now?

MRS. BOOSTROM: A doctorate.

BY THE COURT: You already have a Master's Degree and **[R106]** are going for your PhD?

MRS. BOOSTROM: Yes.

BY THE COURT: And when will that be completed?

MRS. BOOSTROM: I don't know. They give you up to twelve years.

BY THE COURT: How long have you been going for the PhD?

MRS. BOOSTROM: Well, I have been delayed a lot. I have been there three years, but I was delayed a lot by the case in which Mr. Bach was supposed to represent me.

BY THE COURT: And you're not working while you're in school.

MRS. BOOSTROM: Yes, I have been. I was unemployed a couple of weeks ago, but now I have a temporary job.

BY THE COURT. Doing what?

MRS. BOOSTROM: Date entry.

BY THE COURT: And how much do you make an hour there?

MRS. BOOSTROM: I work six hours a day, five days a week, thirty hours a week, and it's a **[R107]** job that depends on fifty percent production. Right now I'm only doing between twenty and thirty-five percent production.

BY THE COURT: How much are you making now?

MRS. BOOSTROM: So the job might not last if I can't type numbers faster. I'm currently making $5.95, but I haven't been paid yet on this job.

BY THE COURT: So you don't have any physical or mental disability that would preclude you from holding employment.

MRS. BOOSTROM: No. I work parttime all during the school year.

BY THE COURT: Okay.

MR. BACH. Judge, I guess that she's submitting this generally that I should argue the other points also here.

BY THE COURT: The other points in reference--

MR. BACH: In the Motion for Summary Judgment. We had an order from Judge Brune that permitted me to withdraw in this case and I have authority **[R108]** there that says that as long as that order stands, that it is valid unless it is--an appeal is taken from it.

MRS. BOOSTROM: Your Honor, could we do one thing at a time--

MR. BACH: No, we can't.

MRS. BOOSTROM: --in case this has to go to the Appellate Court.

BY THE COURT: Mr. Bach, the way I see--

MRS. BOOSTROM: Because Mr. Bach has a tendency to jump all around.

BY THE COURT: Okay. The Motion to Correct Minutes would seem to be the prelude to your Motion for Summary Judgment. If, in fact, I denied it, then it would be outside

the statute of limitations which would take care of your Motion for Summary Judgment. I just--I'm trying to determine at this time the filing fee. Mrs. Boostrom, how many cases have you filed in Vanderburgh County, do you know, personally, as a--

[R109] MRS. BOOSTROM: Well, I used to file some Small Claims, you know, for eviction and to collect rent and damages.

BY THE COURT: Alright, you've filed an estimate of how many cases on your own, without an attorney?

MRS. BOOSTROM: I don't know, just for rent and damages, I don't know. I can't remember, at least six.

BY THE COURT: Okay, and then in some other cases that you've had up there in the past few years, other than the rent and damage cases?

MRS. BOOSTROM: I haven't filed any cases recently.

BY THE COURT: Since January of 1989, have you filed any cases, other than this one?

MRS. BOOSTROM: I haven't had to file any rent and damage cases for a long time down here.

BY THE COURT: Any other type of case? Any other type of case at all?

MRS. BOOSTROM: Well, I countersued Mr. Sheets. That was in 1988.

MR. BACH: You have a case against Mr. Hatfield too, don't **[R110]** you?

MRS. BOOSTROM: Yes, I filed that at the time that I filed against you since you two never got my case settled.

BY THE COURT: Alright, the situation in Mr. Hatfield's case, is it the same?

MRS. BOOSTROM: I filed it at the same date I filed against him.

BY THE COURT: Is there a same or similar petition for Motion to Correct Minutes in that?

MRS. BOOSTROM: Well, there the statute of limitations is based on either two years or six year, but the exact date is not important.

BY THE COURT: Okay, and how did you pay that. You sent the filing fee in with personal check then.

MRS. BOOSTROM: I paid it at the same time that I paid this.

BY THE COURT: In what manner?

MRS. BOOSTROM: This receipt shows money order.

BY THE COURT: Oh, and you sent it in on the same date?

MRS. BOOSTROM: I thought I had sent a check and they **[R111]** wrote back and said I needed to send a money order, so I sent a money order.

BY THE COURT: Well, let me just ask you a question, you filed the suit against Mr. Hatfield and you mailed it on January 12th, just this same date that you did this?

MRS. BOOSTROM: Yes, the same date.

BY THE COURT: And in Mr. Hatfield's case, how is it that you paid the filing fee, did you write a check on January 12th?

MRS. BOOSTROM: I submitted a money order for thirty dollars.

BY THE COURT: On January 12th?

MRS. BOOSTROM: No, this receipt here was for both cases. They wrote back and said I needed to send a money order.

BY THE COURT: You sent a check on them both?

MRS. BOOSTROM: I thought I had. Mr. Bach says I didn't I can't prove that I did. I just thought I did, but I think-

BY THE COURT: Well, I need you to answer my question on **[R112]** Mr. Hatfield's case.

MRS. BOOSTROM: I paid it the same date ~~that I~~ paid Mr. Bach's.

BY THE COURT: Did you write a money order on that one?

MRS. BOOSTROM: Yes, the same money order.

BY THE COURT: On January 12th?

MRS. BOOSTROM: Yes.

BY THE COURT: January 12th?

MRS. BOOSTROM: No, I filed the cases the same date, but she--

BY THE COURT: This one was filed on January 12th. Was Mr. Hatfield's also filed on January 12th?

MRS. BOOSTROM: See here's--I thought I submitted this with my Motion to Correct Error. This is what she wrote back. We must have a sixty dollar money order for these two Small Claim cases.

BY THE COURT: So you sent a check in for both in the first place, right?

MRS. BOOSTROM: Well, I thought I had.

MR. BACH: Your Honor, that is absolutely wrong and the **[R113]** record speaks for itself. There is nothing to contradict that record in here.

BY THE COURT: Do you have a copy of that check?

MRS. BOOSTROM: No.

BY THE COURT: They didn't send you that check back?

MRS. BOOSTROM: I thought I had sent a check and then she wrote and said she needed a money order.

BY THE COURT: Oh, you hadn't sent in anything, is that right?

MRS. BOOSTROM: I didn't pay any attention to it, I just sent the money order 'cause a lot of people require you to send a money order, not a check.

BY THE COURT: In paragraph four of your Motion to Correct Minutes, it says the deputy clerk wrote to me and requested a money order, not a check, for the filing fee.

MRS. BOOSTROM: Uh-huh.

BY THE COURT: Did you send a check in originally?

MRS. BOOSTROM: Well, then later I looked 'cause I wanted--

[R114] BY THE COURT: Yes or no, did you send a check?

MRS. BOOSTROM: --to see if I had and I looked in my checkbook register and I couldn't find any record that I had sent a check, so I don't think I did 'cause I couldn't find a record that I did. But at the time, I thought that I had.

BY THE COURT: So no money was sent in at all on January 12th?

MRS. BOOSTROM: Well--

BY THE COURT: No filing fee at all?

MRS. BOOSTROM: --I thought that I did, but then when I looked back later in case that it came up if I had any proof that I did, I couldn't find anything in my checkbook register, so I don't have any proof that I did.

BY THE COURT: Your Motion for Summary Judgment, does that lie with the statute, the lapsed statute of limitations had run, correct, that's the--

[R115] MR. BACH: That's part of it, Judge. There's two other bases too. One is that--

MRS. BOOSTROM: Your Honor, I wish we would just argue one thing at a time in case I have to--

BY THE COURT: Mrs. Boostrom, I'll decide how we're going to proceed here.

MRS. BOOSTROM: --go to the Appellate Court--

BY THE COURT: Go ahead, Mr. Bach.

MRS. BOOSTROM: --because he jumps around.

BY THE COURT: Mrs. Boostrom, I'll decide how we'll proceed here. Mr. Bach will finish.

MR. BACH: The Court will notice from the certified copy of the motion, the Court after motion was filed--

MRS. BOOSTROM: Your Honor, he asked that the transfer to the--

MR. BACH: Would you please now let me argue. Are you objected to me--

MRS. BOOSTROM: I am a poor person. I have to have justice.

MR. BACH: --interrupting you.

MRS. BOOSTROM: I cannot pay--

[R116] BY THE COURT: Alright, Mrs. Boostrom, I need to hear what he has to say. I've asked him a--

MRS. BOOSTROM: But I don't want the Motion for Summary--

BY THE COURT:--and he's trying to answer me.

MRS. BOOSTROM: --Judgment to be heard until we determine this date.

BY THE COURT: Okay, I'll make a determination on that date. Show that the Motion to Correct Minutes is denied; that the filing--the record will reflect that Mrs. Boostrom has had numerous contacts with the Clerk's Office with reference to previous filings in this County and is well aware of the rules requiring a filing fee; that she has stated that no filing fee was filed whatsoever and the January 12th date does not go into effect because even though it was mailed by certified mail, it still was not perfected because there was no filing fee included. Therefore, the Court determines that the filing date was **[R117]** the date of the second mailing, which falls outside of the statute of limitations which tolled and ended on January 12th, 1990. Mr. Bach, you have a Motion for Summary Judgment based upon failure to perfect filing in the suit within the necessary statute of limitations. We'll show the Motion

for Summary Judgment is granted and that takes care of the case.

MR. BACH: Thank you, Judge. Do you want me to prepare an entry for that?

BY THE COURT: If you would, sir.

MR. BACH: Yes.

AND THIS CONCLUDED ALL PROCEEDINGS HAD IN THIS COURT AT THIS TIME.

COURT ADJOURNED.

(Certifications omitted in printing)

Appendix I
Rules, Statutes & Codes

"The statutes making the payment of fees a prerequisite to filing a complaint are directory only, and a failure to pay these fees will not render the filing of a complaint invalid."

"A clerk of court may justifiably refuse to file a complaint until the proper fees have been paid. "

(*Orr v. Culpepper*, 161 Georgia. App. 801, 288 S.E. 2d 898 (1982).

Vanderburgh Superior Court Rule 5 states: "All withdrawals of appearance shall be in writing and by leave of Court. Permission to withdraw shall be given only after the withdrawing attorney has given his client ten (10) days written notice of this intention to withdraw by both regular and certified mail and has filed a copy of such with the Court; or upon a simultaneous entering of appearance by new counsel for said client. The letter of withdrawal shall explain to the client that failure to secure new counsel or to indicate to the Clerk that the client intends to represent himself, may result in dismissal or the client's case or a default judgment may be entered against him, whichever is appropriate, and other pertinent information such as trial date or any other hearing date. In no event will the Court grant a request for withdrawal of appearance unless the same has been filed with the Court at least ten (10) days prior to trial date, except for good cause shown." "*Rules Of The Vanderburgh Superior Court*," Rule 5.

Small Claims Rule 2

COMMENCEMENT OF ACTION

(A) In General. An action under these rules shall be commenced by the filing of an unverified notice of claim in a court of competent jurisdiction.

(B) Form of Notice of Claim. The notice of claim shall contain:

(1) The name of the court;

(2) The name, address and telephone number of the claimant and defendant(s);

(3) The place, date and time when the parties are to appear for trial of the claim, which date shall not be less than ten [10] days nor more than forty [40] days after service of said notice of claim;

(4) A brief statement of the nature and amount of the claim and

(a) If the claim arises out of written contract, a copy shall be attached; however, the fact that a copy of such contract is not in the custody of the plaintiff shall not bar the filing of the claim;

(b) If the claim is on account, an itemized statement shall be attached;

(5) A statement that the parties may appear either in person or by an attorney;

(6) An instruction to the defendant that the defendant should bring to the trial all documents in the possession of or under the control of the defendant concerning the claim;

(7) A statement that if the defendant does not wish to dispute the claim he may nonetheless appear for the purpose of allowing the court to establish the method by which the judgement shall be paid;

(8) The name, address and telephone number of the person designated by the court with whom the defendant may communicate if defendant is unable to appear at the time or place designated in the notice;

(9) A statement that a default judgment may be entered against the defendant if he fails to appear for trial; and

(10) Notice of the defendant's right to a jury trial and that such right is waived unless a jury trial is requested within ten [10] days after receipt of the notice of claim; and

(11) Any additional information which may facilitate proper service.

(C) Assistance by Clerk. The clerk of the court shall prepare and furnish blank notice of claim forms and the clerk of the court, or other employee of the court as the judge may designate, shall, upon request, assist individual claimants in the preparation thereof, but all attachments to the notice of claim shall be furnished by the claimant.

(D) Number of Claims and Attachments. All claims and attachments thereto shall be filed in such quantity that one copy may remain on file with the clerk, one copy may be delivered to the claimant and one copy may be served on each defendant. [As amended December 23, 1976, effective January 1, 1977; amended November 21, 1980, effective January 1, 1981; amended November 10, 1988, effective January 1, 1989.]

Small Claims Rule 3

MANNER OF SERVICE

For the purpose of service the notice of claim shall also be considered to be the summons. A copy of the notice of claim shall be served upon each defendant. Service may be made by sending a copy by registered or certified mail with return receipt requested, or by delivering a copy to the defendant personally, or by leaving a copy at the defendant's dwelling house or usual place of abode, or in any other manner provided in Trial Rules 4.1 through 4.16. Whenever service is made by leaving a copy at defendant's dwelling house or usual place of

abode, the person making the service also shall send by first class mail a copy of the notice of claim to the last known address of the person being served. [As amended November 21, 1980, effective January 1, 1981.]

Small Claims Rule 4

RESPONSIVE PLEADINGS

(A) Preservation of Defenses. All defenses shall be deemed at issue without responsive pleadings, but this provision shall not alter the burden of proof.

(B) Entry of Appearance. For the purpose of administrative convenience the court may request that the defendant enter an appearance prior to trial. Such appearance may be made in person, by telephone or by mail but the fact that no appearance is entered by the defendant shall not be grounds for default judgment. [As mentioned December 23, 1976, effective January 1, 1977.]

Small Claims Rule 13

APPOINTMENT OF REFEREE BY CIRCUIT JUDGE

An informative small claims manual shall be formulated by the Judicial Conference of Indiana for distribution to the small claims courts. Each county shall reproduce such manual and shall make it available to every litigant and to such other persons or organizations as the court may deem appropriate. [As amended November 1, 1991, effective January 1, 1992].

Appendix J
Cases

"The plain wording of T.R. 3 is that the filing of a complaint or equivalent pleading commences an action. The Indiana Supreme Court has held "[i]n adopting the rule [T.R. 3] we effectively adopted the Federal rule...and in so doing, we adopted the construction which the Federal Courts have placed on the rule." [citations omitted] *State ex rel Long v. Marion Superior Court Civil Division* [1981] Ind., 418 N.E. 2d 218, 219. Hence we look to the federal case law for assistance in determining whether the statute of limitations is tolled by the filing of a complaint.

[2] Literal compliance with T.R. 3 by filing a complaint commences the cause of action and is sufficient to toll the statute of limitations. [citations omitted]

Nor is the statute of limitations only temporarily tolled pending the exercise of due diligence is serving the summons. There are states which by case law have adopted such a temporary or conditional tolling of the statute of limitations upon filing the complaint and thereafter require the complaintant to exercise due diligence is service of process. These states by statute or court rule require service of summons within a specified number of days after the complaint is filed for tolling of the statute of limitations. Wahl, 583 F. 2d at 287. Indiana does not have statute of case law addressing this particular problem. Like the federal rules, the Indiana Rules of Civil Procedure do not establish a time period within which service of process must be completed in order to toll the statute of limitations. Wahl.

One could argue the provisions of Ind. Rules of Procedure, Trial Rule 4 should be incorporated into T.R. 3, thus tolling the statute of limitations conditional upon the

summons being served with due diligence. We refuse to develop such a rule by judicial fiat in light of the plain, unambiguous, and unconditional language of T.R. 3. If tolling of the statute of limitations was intended to be conditioned upon diligence in service, T.R. 3 could have included appropriate language. ....

Memphis Light

"In an important holding, the United States Supreme Court held that the due process clause is applicable to a termination of service by a municipal utility, and the Court considered the adequacy of notice and the adequacy of a hearing before an identifiable property right or interest could be disturbed by a municipal utility, Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1, 98 S.Ct. 1554, 56 L.ED. 2d 30 (1978). The Court said that although the notification form and procedure which the utility used were adequate to inform the plaintiffs of the threat of termination of service, it did not advise them that the utility had a procedure by which they might present their objections to their bills and have an opportunity for a hearing on the termination of service question, and that because of those inadequacies, the notice of termination was constitutionally deficient. (1 Harvey, Indiana Practice, p. 78)

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(1) U.S. District Court, N.E. Indiana, South Bend Division

In 1992, Johnson v. Brown, U.S. District Court, N.E. Indiana, South Bend Division (1992) (803 F. Supp. 1414 an Indiana federal court held that a EEOC Title VII action was commenced prior to the expiration of a statute of limitations the complaint was "lodged" with the clerk although Johnson still had not paid the filing fee.

"Thus, Mr. Johnson's complaint should be deemed filed by January 21 at the latest, notwithstanding his failure to pay the filing fee until February 6. Although *Rogers* [790 F. 2d at 1552]
addressed the issue of whether the late payment of fees required by 28 U.S.C.§ 1914 was a jurisdictional bar to bringing suit, it is squarely on point since the language in District Rule 3 (a) is, in pertinent part, identical to § 1914.

Mr. Johnson's case is distinguishable from *Ortiz* [581 F. Supp. at 1261] First, *Ortiz* preceded *Rodgers* and *Gilardi*. Based on *Glardi*, "filing" for statute of limitation purposes is satisfied when a complaint is in the clerk's custody. A district rule should no longer act as a jurisdictional bar. Under Rogers, Mr. Johnson's complaint was timely because it was lodged with the clerk within the extended limitations period. (*Johnson v. Brown*, U.S. District Court, N.E. Indiana, South Bend Division (1992) 803 F. Supp. 1414 at 1418)

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(2) U.S. District Court for the Middle District of Florida

The Indiana Court of Appeals' opinion used this cause of action commenced with the filing of a complaint, and involved the payment of the filing fee for a complaint; in which a U.S. Supreme Court case on payment of an appeals filing fee was used as authority,

[1] We first address the question whether Rodgers' action was properly dismissed for lack of jurisdiction and failure to state a claim upon which relief can be granted. [FN1 ...Thus, to the extent that 'failure to state a claim' goes to the merits of the case, we do not reach it here. It is open to the parties on remand to make such presentations on the merits as may then be appropriate.]
Section 405 (g) states in pertinent part:

Any individual, after any final decision [of a social security claim] of the Secretary [of Health and Human Services] made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. One of the basic cannons of statutory interpretation is that '[a]bsent a clearly expressed legislative intention to the contrary, [the language of the statute] must ordinarily be regarded as conclusive.' Consumer Product Safety Commission v. GTE Sylvanis, Ind. 447 U.S. 102, 108. 100 S. Ct. 2051, 2056, 64 L. Ed. 2d 766 (1980). We find no expressed intent by Congress to give the word "commenced" any meaning other than that which is given in Fed. R. Civ. P. 3. We therefore hold that an action is commenced within the meaning of § 405(g) when a complaint is filed with the court. See Fed. R. Civ. P. 3; Howard v. Lockheed-Georgia Co. 742, F. 2d 612, 613 (11th Cir. 1984). See also Lyons v. Goodson, 787 F. 2d 411, 412 (8th Cir. 1986); Loya V. Desert Sands Unified School District, 721 F. 2d 279, 281 (9th Cir. 1983).

[2] The Secretary argues that a complaint is not 'filed' until the filing fee required by 28 U.S. C. § 1914 has been paid. We cannot agree. .... (at 1551)

The Supreme Court has held, with respect to 28 U.S.C.A. § 1917, that untimely payment of a filing fee does not vitiate the validity of a notice of appeal. Parissi v. Telechron,Inc. 349 U.S. 46, 75 S. Ct. 577, 99 L. Ed. 46 (1955) (per curiam). We perceive no distinction between § 1917 and § 1914, which requires filing fee for complaints, that would lead to a different conclusion here. Id. at 547. **We therefore hold that a complaint is "filed" for statute of limitations purposes when it is 'in the actual or constructive possession of the clerk,"** Legett V. Strickland, 640 F. 2d 774, 776 (5th Cir. 1981), **regardless of the untimely payment of**

the required filing fee. See also Lyons, at 412, Lopya, 721 F. 2d at 281." (at 1552)

Service of Process ordinarily is not untimely until one hundred twenty days after the filing of a complaint. Fed. R. Civ. P.. 4 (j). Service here was well within that time limit and did not amount to unreasonable delay or contumacious conduct by Rogers. (at 1553)

(*Rodgers v. Bowen*, U.S. District Court of Appeals, Florida, 790 F. 2d 1550 at 1551-1552).

"In the matter of the ESTATE of Edna CRANE, Deceased in the State of Washington:

"The sole issues raised by this appeal is whether timely payment of the superior court clerk's filing fee is a jurisdictional requirement for commencement of a will contest.

....

We found no Washington cases directly on point to aid in interpreting RCW 36.18.020 (12), which is party of the statutes establishing various fees payable to county officials for their authorized acts--including also the auditor, coroner, sheriff, and treasurer. The fees are to be paid into the county treasury. RCW 36.18.140; RCW 36.18.170. Moreover, the county officers are not to perform the service requested unless the appropriate fee is paid. RCW 36.18.060. The chapter also requires the posting of fee schedules, the giving of fee receipts, and the keeping of a fee book. In short, the chapter is intended to provide a uniform method for the collection and disbursement of fees by the various county officials. It does not, however, make mention of requisites to court jurisdiction in any kind of proceedings.

Jurisdiction over a will contest is governed by RCW 11.24.010, which provides in pertinent part as follows: If any person interested in any will shall appear within four months immediately following the probate or rejection thereof, and by petition to the court having jurisdiction contest the validity of said will, or appear to have the will proven which has been rejected, he shall file a petition containing his objections and exception to said will, or to the rejection thereof. If no person shall appear within the time aforesaid, the probate or rejection of such will shall be binding and final. This statute requires simply the Filing of the petition, which in the instant case was accomplished. While it is apparent under RCW 36.18.060 that the clerk's office should have collected the fee and that a new file should have been opened, we believe that the act of filing nevertheless vested jurisdiction over the will contest in the superior court as of the filing date. (*Estate of Crane*, 548 P. 2d 585 at 586).

"As preliminary matters, we note (1) that the statute of limitations provides that an action for personal injuries 'shall be commenced within two years after the cause of action accrued'(Ill. Rev. Stat. 1973, ch. 83, par. 15); (2) that the cause of action here accrued on November 15, 1974; (3) that an action is commenced by the filing of a complaint (Ill. Rev. Stat. 1973, ch. 110, par. 13); and (4) that, therefore, the complaint in this case must have been filed on or before November 15, 1976, in order to comply with the limitation's provision. Further, we take notice that, as a matter of necessary, the clerks of the circuit court delegate to their employees the authority to file documents.

[2] The sole issued to be decided is whether payment in advance of the filing fee is a condition precedent to the 'filing of a complaint,' for the effect of the trial

court's order of dismissal was to hold that it is. Although by statute the fees of the clerk of the circuit court 'shall be paid in advance' (Ill. Rev. Stat., 1973, ch. 53, par. 31), this language has been interpreted to be merely directory, not mandatory, *In Elles v. Industrial Comm.* (1940), 375 Ill. 107, 30 N.E. 2d 615, the plaintiff sought to appeal a decision of the Industrial Commission to the circuit court. However, the plaintiff did not pay the filing fee. The clerk of the circuit court filed the action even though a statute provided that fees of the clerk "shall be paid in advance.' The supreme court held that the statute was merely directory to the clerk and that failure to pay the filing fee did not deprive the circuit of jurisdiction.

.... According the order of dismissal of complaint is reversed, and the cause is remanded for further proceedings." (Hanks v. Floyd, 367 N.E. 2d 483 at 483-484, Ill. App. 3d (1977).

"The initial complaint in this case was actually received by the clerk of the circuit court for filing on April 22, 1986, but returned due to the failure to pay a filing fee. Plaintiffs argue that the failure to pay is irrelevant, and that the operative date for purposes of the statute of limitations in April 22. We agree. Every action is deemed commenced when the complaint is "filed." Fla. R. Civ. P. 1.050. For a complaint to be "filed it is not necessary that the fee be paid, only that the complaint be received by the clerk. See Outboard Marine Domestic International Sales Corp. v. Florida Stevedoring, Corp., 483 So. 2d 823 (Fla. 3d DCA 1986). That delivery occurred in the instant case two days prior to the expiration of the tolled statute of limitations, and, thus, the complaint was timely filed." *Abston v. Bryan*, M.D. Florida (1988), 519 So. 2d 1125 at 1126.

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(6) Illinois lower court filing fee to commence an action:

Ayala v. Goad:
[2] It is well established that the statutory requirement that filing fees be paid in advance is directory rather than mandatory and, therefore, it is not a necessary predicate for the trial court to acquire jurisdiction of a case. (In re Marriage of Sava (1985), 139 Ill. App. 3d 68, 74, 93 Ill. Dec. 483, 488, 486 N.E. 2d 1318, 1323.) Although a filing fee has not been paid the clerk has the authority to file a complaint, and it is now clear that the payment in advance of a filing fee is not a condition precedent to the filing of a complaint for statute of limitations purposes. Hanks v. Floyd (1977), 51 Ill. App. 3d 1048, 1050, 10 Ill. Dec. 95, 96, 367 N.E. 2d 483, 484.
(Ayala v. Goad, Appellate Court of Illinois (1988), 531 N.E. 2d 1040 at 1043)

...We point out that the clerk may refuse to accept a document unless the fee is paid (Ill. Rev. Stat. 1987, ch. 25, Par. 27.1....Where the court becomes aware that the fee has not been paid, it may properly order the fee paid before proceeding with the matter, but the harsh remedy of dismissal with prejudice should be considered only upon plaintiff's noncompliance with an order for payment. See generally Ganja v. Johnson (1972), 6 Ill. App. 3d 701, 703, 286 N.E. 2d 775, 777.
(Ayala v. Goad, Appellate Court of Illinois (1988), 531 N.E. 2d 1040 at 1043)

"The question presented in this case, therefore, is **whether a petition for review is**

timely if it is received in the court of appeals within the six-day period set forth in § 921(c) but is not filed by the clerk until the petitioner has submitted additional copies of the petition and a list containing the names and addresses of counsel for respondent, in compliance with Rule 15(c), **and has paid the docketing fee** or filed a motion to proceed in forma pauperis. We will have jurisdiction if Mrs. Wisneiwski's petition for review properly may be considered filed on June 30, 1988, within sixty days after issuance of the Board's order. If, instead, the petition for review is considered as filed on August 10,1 988, upon Mrs. Wisneiwski's payment of the docketing fee and submission of additional copies of the petition, the petition was untimely and should be dismissed for lack of jurisdiction.

... The payment of filing and docketing fees is not a jurisdictional requirement of Rule 3. *Parissi v. Telechron, Inc.* 349 U.S. 46, 75 S. Ct. 577, 99 L. Ed. 867 ....(Wisniesski v. Director, OWCP, U.S. Dept of Labor (929 F. 2d 952 (1991)

"Equitable filing is fitting where the court has led the plaintiff to believe that he has done everything required of him. Baldwin County Welcome Center v. Brown, 466 U.S. 147, 151, 104 S. Ct. 1723, 1725, 80 L.Ed. 2d 196(1984). Similarly courts have held that equitable tolling is applicable where the county clerk misleads a plaintiff in the filing of his compliant or otherwise errors in the filing process. Gonzalez-Aller Balseyro v. GTE Lunkert, Ind, ... ; see also Bell v. Veteran's Administration Hospital, 654 F. Supp. 69, 70 (W. D. La.) aff'd, 826 F. @d 357 (5th Cir. 1987)

Mr. Johnson's case is distinguishable from *Ortiz* [581 F. Supp. at 1261] First, *Ortiz* preceded *Rodgers* and *Gilardi*. Based on *Gilardi*, "filing" for statute of limitation purposes is satisfied when a complaint is in the clerk's custody. A district rule should no longer act as a jurisdictional bar. Under *Rogers*, Mr. Johnson's complaint was timely because it was lodged with the clerk within the extended limitations period. (Johnson v. Brown, U.S. District Court, N.E. Indiana, South Bend Division (1992) 803 F. Supp. 1414 at 1418)

Appendix K
Other Authority

The disjunctive use of "or" means "or":

> "[6] The words "and" and "or" as used in statutes are not interchangeable, being strictly of a conjunctive and disjunctive nature respectively, and their ordinary meaning should be followed if it does not render the sense of the statute dubious. Sekerez v. Youngstown Sheet & Tube Company, (1975) 166 Ind. App. 563, 337 N.E. 2d 521 (*Barr v. Sun Exploration Co,Inc. v. Barr*, Ind. App., 1982, 436 N.E. 2d 821) .

Also, confer: " The Drafting Manual for the Indiana General Assembly [Drafting Manual] (1976), states ...An 'or' is used to designate when a series is to be read in the disjunctive. The word 'disjunctive' is defined as, 'Designating a conjunction....which denotes an alternative, contract, or opposition between the ideas it connects.' (*Jeffboat, Inc., v. Review Board of the Indiana Employment Security Division*, Ind. App. (1984), 464 N.E. 2d 377 at 378)

" Rule 3 will repudiate the cases holding that the issuance of summons or appearance is jurisdictional for commencement of the action and may not be waived. Cf. Fribe v. Elder, 181 Ind. 597, 105 N.E. 151 (1914); 13 Ind. L. J. 203, 205 (1938).

This provision modifies its counterpart in the federal rules by making it clear that an action in court is commenced by filing not only a complaint, but other similar pleadings used to initiate actions, particularly, special proceedings. For example, claims

against decedent's estate are not filed by complaint or initiated by summons. See Burns' Stat. § 7-802. Also compare Indiana Supreme Court Rule 1-17 adopting the same procedure for claims in receivership proceedings. Judicial review of administrative actions often is initiated by pleadings denominated by other names. E.G., Burns' Stat. , § § 63-3014 ('petition for review'), 53-783 (certiorari from decision of board of zoning appeals). One rule, therefore, will apply to all such court proceedings [emphasis added] except criminal cases.

(Civil Code Study Commission Comments, reprinted in 1 Harvey, supra, p. 60-61)

Indiana Forms of Pleading and Practice (1990), in their analysis of "Commencement of Action":

"[2] Under Federal Rule 3 there is a split in authority as to whether an action is properly commenced without payment of the filing fee, but the **more recent cases hold that payment of the fee is not required for the action to be commenced. Indiana courts should follow the example of the more recent federal cases.[emphasis added]**" (Trial Rule 1, Federal Rule 3.06, Indiana Forms of Pleading and Practice.)

3.07 When is a Complaint "Filed" with the Court?

"Trial Rule 5 provides that the filing of pleading and papers with the court " as required by these rules" shall be made by:
(1)...[in person]
(2) mailing the papers to the clerk by registered or certified mail return receipt requested (in which case filing is complete upon mailing) or
(3)...[with judge]

> The federal courts have been liberal in their construction of what constitutes sufficient delivery to the clerk for the purposes of filing in order to avoid harsh results such as the running of the statute of limitations." [emphasis added](Trial Rule 1, Federal Rule 3.07, Indiana Forms of Pleading and Practice.)

Under Federal Rule 3.08, Trial Rule 1 in Indiana Forms of Pleading and Practice:

> "As noted above an action should be deemed "commenced" when the complaint is filed with the clerk **even though summons has not yet been issued or the filing fees paid.** [emphasis added] What then if a plaintiff refuses or fails to cause summons to be issued to pay the filing fees within a reasonable time after filing the complaint? Under Trial Rule 41, the court is empowered to dismiss the complaint for failure of a party to prosecute the action, comply with the rules or with any order of the court."(Indiana Forms of Pleading and Practice, Trial Rule 1, Federal 3.08).

CONTINGENT FEE CONTRACT

"This agreement, made and entered into this 10th day of February, 1985, by and between the undersigned, Rebecca Boostrom, Client, and Steve C. Bach and Russell S. Armstrong, Attorneys, witnesseth:

Whereas the Client was and is **the owner of the following described real estate** .... [description of real property omitted here]

And whereas the Client has claims against Ray L.Clark and Barbara D. Clark, individually and as husband and wife, and Title Insurance Company of Minnesota for the **unlawful trespass**

and occupation of said real estate by said Clarks.

And whereas the Client wishes to make claims nd if necessary to **take action against said Clarks and said title company and any other responsible parties.**

Now, therefore, it is agreed:

1. **That the Attorneys are empowered and agree to enforce claims** against any parties **for such unlawful trespass and/or occupation of said real estate** and perform all the services, as Attorneys, necessary and appropriate thereto whether by instituting, maintaining **and defending to completion an action** or actions or other legal proceedings, or otherwise; ...

2. As compensation for the said services, by the said Attorneys, the Client will pay to them 40% of anything received or collected on said claim by judgement or judgements obtained thereon....

3. .... [Client will pay costs.]

4. ...[Additional counsel will not increase fee herein]

/s/ Rebecca Boostrom (Signature), Client

/s/ Steve C. Bach (signature), Client
Steve C. Bach, Attorney

Russell S.Armstrong
Russell S. Armstrong, Attorney

(Record, "Complaint," p. 4-5, emphasis added)